89-1690

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES STEVEN ACEVEDO,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
RICHARD B. IGLEHART,
Chief Assistant Attorney
General
HARLEY D. MAYFIELD,
Assistant Attorney General
FREDERICK R. MILLAR, JR.,
Supervising
Deputy Attorney General
ROBERT M. FOSTER, Supervising
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7253

Attorneys for Petitioner

TABLE OF CONTENTS

APPENDIX A

APPENDIX A

CERTIFIED FOR PUBLICATION

[Filed December 12, 1989]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	G007480
v.	)	(Super. Ct. No.
CHARLES STEVEN ACEVEDO,	)	C-68857)
Defendant and Appellant.	)	OPINION

Appeal from the judgment of the Superior Court of Orange County, Myron S. Brown, Judge. Reversed with directions.

Theodore A. Cohen for Defendant and Appellant.

John K. Van De Kamp, Attorney General, Richard B. Iglehart, Chief Assistant Attorney General, Harley D. Mayfield, Assistant Attorney Genera, Jarelle B. Davis and Robert M. Foster,

Deputy Attorneys General, for Plaintiff and Respondent.

Charles Acevedo's motion to suppress was denied, and he pleaded guilty to possession of marijuana for sale. Under compulsion of United States Supreme Court authority, we agree the warrantless search of a lunch bag seized from the trunk of his car was unlawful and reverse accordingly.

I

In October 1987, federal drug enforcement agents in Hawaii seized a Federal Express package containing a cooler and nine clear bags of marijuana addressed to J.R. Daza at 805 West Stevens Avenue in Santa Ana. In cooperation with federal officials, Santa Ana police confirmed Daza's address and telephone number and left the package at the local Federal Express office for pickup.

Police followed Daza home after he retrieved the package. Daza left his apartment approximately 45 minutes later and discarded the wrapping and cardboard box in a trash bin. One of the surveilling officers went to obtain a search warrant for the apartment.

Within one-half hour, Acevedo's codefendant, Richard St. George, also walked out of the apartment, a blue knapsack on his back. Officers detained St. George, searched the knapsack, and found more than a pound of marijuana inside.

Within another half hour, an empty-handed Acevedo entered the apartment. He left ten minutes later carrying a brown lunch bag which appeared to be full. He placed the bag in the trunk of an automobile and drove away. Fearing the loss of evidence, police officers stopped the car, opened the trunk, searched the

brown bag, and discovered marijuana. The search warrant for the apartment arrived soon after.

In the superior court, Acevedo contended the officers lacked probable cause to search the trunk of the car. He also argued the officers could not open the lunch bag without a warrant. We disagree with the first contention, but the second carries the day.

II

Acevedo relies on *People* v. *Valdez* (1987) 196 Cal.App.3d 799 to support his claim that the trunk search was without probable cause. In *Valdez* a film canister containing contraband was suppressed because officers had no probable cause for its seizure: Nothing connected the defendant to the sale of illegal drugs; and a canister "is not a distinctive drug-carrying item equivalent to a heroin balloon, a paper bindle, or a marijuana-

smelling brick-shaped package, which may be seized upon observation." (*Id.*, at pp. 806-807.) Here, however, there was more than a fair probability Acevedo was involved in dealing drugs and carrying marijuana in the lunch bag (*Illinois* v. *Gates* (1983) 462 U.S. 213, 238): Although the occupant of the apartment was not in, an empty-handed Acevedo entered within two hours of the arrival of a sizeable quantity of contraband and emerged with something in a brown paper bag which approximated the size of the wrapped packages officers knew contained marijuana. Accordingly, there was probable cause for a warrantless search of the trunk and seizure of the brown bag under the automobile exception to the Fourth Amendment. (See generally *United States* v. *Ross* (1982) 456 U.S. 798.)

/

/

III

But could the officers open the bag they lawfully seized? They could not without first obtaining a warrant.

That is the rule of a line of cases headed by *United States* v. *Chadwick* (1977) 433 U.S. 1. There, federal agents had probable cause to believe marijuana was concealed in a footlocker located in the trunk of a car. The occupants were arrested, and the footlocker was seized and searched without a warrant. The Supreme Court found the search unlawful. There are, ruled the court, significantly greater privacy interests in personal luggage as opposed to cars: "Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal affects." (*Id.*, at p. 13.)

In *United States* v. *Ross*, *supra*, 456 U.S. 798, on the other hand, officers had

probable cause to believe narcotics were being sold from the trunk of the defendant's vehicle. Police stopped the car, saw a bullet on the front seat, and retrieved a pistol from the glove compartment. The defendant was arrested, and officers opened the car's trunk and removed a brown paper bag. They searched it and found heroin. They discovered additional contraband in a zippered pouch. The Supreme Court upheld the warrantless search, distinguishing *Chadwick* on the basis that probable cause to search was limited to the footlocker in that case. In *Ross*, however, "police officers had probable cause to search respondent's entire vehicle." (*Id.*, at p. 817, emphasis added.)[1/]

1.*Ross* did reject the suggestion in *Arkansas* v. *Sanders* (1979) 442 U.S. 753, 764, footnote 13 that a warrant may always be required to search containers found in a vehicle. (*United States* v. *Ross*, *supra*, 456 U.S. at p. 824.)

This distinction was more recently noted in *United States* v. *Johns* (1985) 469 U.S. 478. There, customs officers developed probable cause to believe marijuana had been smuggled into parked trucks at a remote private airstrip. Federal agents approached the trucks, detected the odor of marijuana, and saw packages likely to contain contraband. The packages were seized and searched without a warrant.

Chadwick was inapplicable, determined the Supreme Court, because the customs officers "were unaware of the packages until they approached the trucks, and contraband might well have been hidden elsewhere in the vehicles . . . [T]he Customs officers had probable cause to believe that not only the packages but also the vehicles themselves contained contraband. . . . [T]he police [in *Chadwick*] had no probable cause to believe

that the automobile, as contrasted to the footlocker, contained contraband." (*Id.*, at pp. 482-483.)

Shortly after *Johns* the Supreme Court divided equally in affirming without opinion a decision of the Oklahoma Court of Criminal Appeals to suppress evidence obtained under circumstances similar to ours. (*Oklahoma* v. *Castleberry* (1985) 471 U.S. 146.) In *Castleberry* v. *State* (Okla. Crim. App. 1984) 678 P.2d 720, police officers knew the defendant carried narcotics in blue suitcases in the trunk of a car. After arresting him, they opened the trunk, seized the suitcases, and searched them without a warrant. Relying on *Chadwick* and *Sanders*, the Oklahoma appellate panel determined the contraband should have been suppressed: "If the officer has probable cause to believe there is contraband somewhere in the car, but he does not know exactly

where, he may search the entire car as well as any containers found therein. [Citations.] If, on the other hand, the officer only has probable cause to believe there is contraband in a specific container in the car, he must detain the container and delay his search until a search warrant is obtained. [Citations.]" (*Id.*, at p. 724.)

The Ninth Circuit, on facts remarkably close to those of the present case, has also confirmed the continuing validity of the *Chadwick-Ross* distinction. In *United States* v. *Salazar* (9th Cir. 1986) 805 F.2d 1384, 1396, police officers observed known drug dealers deliver suspicious-looking packages to others. The recipients were detained, and a search of the packages revealed cocaine. Officers then saw the dealers hand a brown shopping bag to Salazar, who placed the item in a locked car. Salazar was stopped

as he drove away, and the bag was seized and searched. Citing *Chadwick*, the Court of Appeals concluded a warrantless search of the bag was unlawful: "Where, prior to a search, officers have probable cause to believe that a specific closed container holds contraband . . . , they must obtain a search warrant before opening it, even though it is located in an automobile. [Citation.]" (*Id.*, at p. 1397.)

We recognize the anomalous nature of the *Ross-Chadwick* dichotomy: If police have probable cause to believe contraband is concealed in a particular container, they must obtain a warrant before searching it, even when it is being stored in a vehicle. If the investigation has, for whatever reason, yet to focus on a particular container and there is only probable cause to believe the contraband is located <u>somewhere</u> in an automobile, officers may conduct a warrantless search

of any container in the car that could reasonably conceal the evidence. The first situation was described by Justice Kaus in *People* v. *Ruggles* (1985) 39 Cal.3d 1 as "type A" and the second "type B." The crucial distinction is that in a type A case "officers do not have probable cause to believe the vehicle itself -- as distinguished from the container -- contains seizable material." (*Id.*, at p. 14 (dis. opn. of Kaus, J.).)

One unfortunate feature of the rule is an incentive for police officers to withhold evidence related to probable cause in order to fit within the more generous confines of *Ross*. Despite misgivings concerning the continuing validity of *Chadwick* after *Ross*, we are in no position to ignore the Supreme Court's current mandate. This is a type A case; the officers had probable cause to believe marijuana would be found only in a brown

lunch bag and nowhere else in the car. We are compelled to hold they should have obtained a search warrant before opening it.

The Attorney General raises several arguments in support of the search. He contends the warrant issue was waived. But the record indicates the parties stipulated to a statement of facts (with minor additions) taken from the prosecutor's responding papers below and both sides would stipulate to additional facts as issues arose. Acevedo's counsel argued, "Now, then according to *Castleberry*, which is a Ninth Circuit [sic] case, according to that they have to have a search warrant to search the bag." Counsel's citation may have been skewed but it was adequate to place the necessity of a warrant at issue. We agree the statement of facts is thin regarding the actual search of the trunk and lunch bag,

but the failure of the record on this point is the responsibility of the prosecutor who had the burden to establish the reasonableness of the search and failed to present additional facts or testimony.

The Attorney General also argues, "[s]ince the officers had probable cause to arrest appellant they had the right to search the entire car and any objects in the car." This argument misstates the law, however, for police may only search the passenger compartment of a car incident to a lawful arrest. (*New York* v. *Belton* (1981) 453 U.S. 454.) The *Chadwick-Ross* line of cases applies to trunk searches.

The Attorney General urges application of the inevitable discovery doctrine, claiming the warrant which arrived shortly after the search of the bag would have authorized its search as

part of the contents of the apartment and that the police could have secured the premises pending the arrival of the warrant and prevented its departure. He cites no evidence in the record of legal authority to support these propositions. Police officers have no right to track down an item in the vehicle or home of another merely because certain items expected to be found in the place subject to the warrant happen to be missing when it is executed. The warrant authorized the search of Daza's apartment, not a third party's vehicle or bag located far from the premises.

We need not decide whether a warrant would have been issued for the unopened bag in police custody. The bag itself was innocuous, and the police knew nothing of Acevedo before he visited Casa Daza. But the argument is beside the point. If warrantless searches could be upheld on an

inevitable discovery theory on the basis that a warrant <u>would</u> have issued, no one would bother to secure one.

We are aware that the California Supreme Court has recently said, "We further note that the evidence seized in the house inevitably would have been discovered. [Citations.] The officers who initially entered the . . . house observed blood throughout. It appeared likely that the killer had entered the house and showered; relevant evidence was probable inside. The house was secured and, as the trial court noted, `there is not a judge in the world that would not sign a warrant with these facts.'" (*People* v. *McDowell* (1988) 46 Cal.3d 551, 564.) We view this language as unfortunate dicta, sure to cause mischief and sure to be recanted by our Supreme Court or rejected by the United States Supreme Court should the occasion arise.

[2/] Until one of the two higher courts holds otherwise, we cannot accept the spurious notion that probable cause to obtain a search warrant is the equivalent of having done so: "Searches conducted without warrants have been held unlawful `notwithstanding facts unquestionably showing probable cause' [citation], for the Constitution requires `that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . .'" (*Katz* v. *United States* (1967) 389 U.S. 347, 356-357; see also *Lorenzana* v. *Superior Court* (1973) 9 Cal.3d 626, 639.)

2.We do not understand our concurring colleague's refusal to react to the *McDowell* language we question. It is cited in the Attorney General's brief, and it was specifically urged as biding authority at oral argument for the proposition that probable cause sufficient to obtain warrant is in and of itself enough to uphold a warrantless search.

Finally, the Attorney General claims transportation of the marijuana was a separate crime and the car itself became evidence which could have been seized and searched. Whether the scope of that search would permissibly reach closed containers during an inventory of the vehicle we need not address. This argument was not presented in any fashion below: "If the People had other theories to support their contention that the evidence was not the product of illegal police conduct, the proper place to argue those theories was on the trial level at the suppression hearing. The People offered no such argument at that hearing and may not do so for the first time on appeal." (*Lorenzana* v. *Superior Court*, *supra*, 9 Cal.3d at p. 640; *People* v. *Neer* (1986) 177 Cal.App.3d 991, 1006 (dis. opn. of Crosby, J.); *United States* v. *Salazar*, *supra*, 805 F.2d at pp. 1398-1399.)

The judgment is reversed with directions to grant the motion to suppress.

Crosby, Acting P.J.

I concur:

Wallin, J.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

SONENSHINE, J., concurring:

I concur with the result but withhold judgment at this time on the import of the quoted language of *People* v. *McDowell* (1988) 46 Cal.3d 551. I believe that analysis is unnecessary to the opinion, in that the Attorney General's inevitable discovery argument is not based on the theory a different warrant would have issued from any "judge in the world." Rather, he argues "the officers could have searched the bag under the auspices of the warrant that arrived ten minutes later," rendering it "independently admissible under the doctrine of inevitable discovery." Therefore his argument is not that a warrant would have issued, it is that one did issue and that the issued warrant inferentially encompassed the bag. The majority addresses the contention, but by disposing of an argument not raised by

the parties, it is erecting a straw person to knock down.

/s/

SONENSHINE, J.

APPENDIX B

APPENDIX B

CERTIFIED FOR PUBLICATION

[Filed December 20, 1989]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,	)	G007480
Plaintiff and Respondent,	)	(Super. Ct. No. C-68857)
v.	)	
CHARLES STEVEN ACEVEDO,	)	ORDER MODIFYING CONCURRING OPINION, NO CHANGE IN JUDGMENT
Defendant and Appellant.	)	

THE COURT:

It is ordered that the concurring opinion filed herein on December 12, 1989, be modified in its entirety as follows:

I concur with the result but withhold judgment at this time on the import of the quoted language of *People* v. *McDowell* (1988) 46 Cal.3d 551. I believe that

analysis is unnecessary to the opinion, in that the Attorney General's inevitable discovery argument was not based on the theory a different warrant would have issued from any "judge in the world." Rather, he argued, "the officers could have searched the bag under the auspices of the warrant that arrived ten minutes later," rendering it "independently admissible under the doctrine of inevitable discovery." Therefore his argument was not that a warrant would have issued, it was that one did issue and that the issued warrant inferentially encompassed the bag.

Contrary to the majority's opinion, my review of respondent's brief reveals not a single citation to *McDowell*. While respondent did attempt to inject such an analysis for the first time during oral argument, I believe the issue was not timely raised. The majority addresses the

contention, but by disposing of an argument not properly raised by the parties, it is erecting a straw person to knock down.

There is no change in judgment.

CERTIFIED FOR PUBLICATION

s/SONENSHINE
SONENSHINE, J.

APPENDIX C

APPENDIX C

CERTIFIED FOR PUBLICATION

[Filed December 29, 1989]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,	G007480
Plaintiff and Respondent,	(Super. Ct. No. C-68857)
v.	
CHARLES STEVEN ACEVEDO,	ORDER MODIFYING OPINION
Defendant and Appellant.	

The opinion in this matter was filed December 12, 1989, and certified for publication. The majority opinion is modified as follows:

(1) On page 10, line 14, insert "2" at the end of the sentence which concludes, "should the occasion arise."

(2) Delete footnote 2 in its entirety and substitute the following in its place:

2 We do not understand our concurring colleague's refusal to come to grips with the *McDowell* language we question. It was specifically urged as binding authority at oral argument for the proposition that probable cause sufficient to obtain a warrant is in and of itself enough to uphold a warrantless search; it must be addressed.

The modification does not effect a change in the judgment.

Crosby, Acting P.J.

I concur:

Wallin, J.

APPENDIX D

APPENDIX D

CERTIFIED FOR PUBLICATION

[Filed January 03, 1990]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHARLES STEVEN ACEVEDO, Defendant and Appellant.	G007480 (Super. Ct. No. C-68857) ORDER MODIFYING CONCURRING OPINION, NO CHANGE IN JUDGMENT

The concurring opinion filed herein on December 12, 1989, certified for publication, and modified December 20, 1989, is further modified as follows:

Delete the introductory phrase "Contrary to the majority's opinion," at the beginning of the second paragraph.

/

There is no change in judgment.

s/SONENSHINE
SONENSHINE, J.

APPENDIX E

APPENDIX E

[Filed March 15, 1990]

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division Three, No. G007480

S013758

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

CHARLES STEVEN ACEVEDO

Respondent's petition for review DENIED.

Panelli, J. is of the opinion the petition should be granted.

/s/ Lucas
Chief Justice